ARAB MALAYSIAN MERCHANT BANK BHD.

v.

DR. JAMALUDIN DATO' MOHD. JARJIS

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 03-37 OF 1990]
4 MARCH 1991

CIVIL PROCEDURE: *Intervention of persons not parties - Principles - Proprietary and pecuniary rights - Affecting pocket of a party - Rules of the High Court 1980, O. 15 r. 6.*

The appellant, AMMB, had on 18 February 1985 obtained judgment in default against the judgment debtors, B in a civil suit. When a demand was made on B, the respondent J undertook to settle the judgment debt by monthly instalments in consideration of AMMB refraining from enforcing the judgment. To this end, a letter of undertaking dated 10 December 1986 was executed by J before an advocate and solicitor. In the middle of 1988, J was unable to meet the instalment payments and applied to set aside the judgment in default on the ground that it was irregular as the interest ordered to be paid in the judgment far exceeded that allowed under O. 42 r. 2 of the Rules of the High Court 1980 (RHC). J's application to intervene was allowed and he was made a party to AMMB's suit against B. AMMB's appeal against J's intervention was dismissed. AMMB appeals against this dismissal.

AMMB contended that B has not applied to set aside the said judgment which allowed interest at the contractual rate and that J should have applied to set aside the agreement in the letter of undertaking. AMMB had instituted action against J for breach of the said undertaking.

The issue for the Court was the test which should be applied to decide whether a person is entitled to be added as a party.

Held:

[1] (a) One of the principal objects of O. 15 r. 6 of RHC 1980, which replaced O. 16 r. 11 of Rules of Supreme Court 1967, is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without giving this person an opportunity of being heard.

(b) However, as stated by the Privy Council in the *Pegang Mining* case, to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases.

[2] As a result of *Gurtner v. Circuit*, a person who is not a party is allowed to intervene if the intervener is directly affected not only in his legal rights (as provided for under O. 15 r. 6 RHC 1980) but in his pocket.

[3] In this case, J, who had undertaken to pay the debt of B, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the said judgment, which includes excessive interest, is not set aside.

[Appeal dismissed.]

Cases referred to:
Gurtner v. Circuit [1968] 1 All ER 328
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6, O. 42 r. 12
Rules of the Supreme Court 1957, O. 16 r. 11
Supreme Court Practice [UK], O. 15 r. 6

For the appellant - D.P. Naban (Shakila Azariah with him); M/s. Syed Alwi Ng & Teoh
For the applicant/intervener/respondent - Liza Chan; M/s. Liza Chan & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

We dismissed this appeal with costs and ordered that the deposit be paid to one Dr. Jamaludin bin Dato' Mohd. Jarjis (the respondent) to account of his taxed costs and now give the reasons for our decision.

The issue in this case was whether the respondent should be allowed to intervene in Civil Suit No. C 2870-84 between Arab Malaysian Merchant Bank Berhad (the appellant) and Azam Murni Sdn. Bhd. and one Mohamed Mazlan bin Idris (the judgment debtors). The appellant had on 18 February 1985, obtained judgment in default of appearance against the judgment debtors in the said civil suit for a sum of RM82,475.70 together with interests at 0.5% per day calculated from 1 April 1984, to date of realisation and RM225 costs. When a demand was made on the judgment debtors, the respondent undertook to settle the judgment debt by monthly instalments of RM3,000 each in consideration of the appellant refraining at his request from enforcing the judgment against the judgment debtors. A letter of undertaking dated 10 December 1986, was executed by the respondent before an advocate and solicitor. (See p. 33 of the appeal record). The respondent kept up with his instalment payments until the middle of 1988 when he was unable to do so due to financial difficulties, and on 28 June 1989, he applied to set aside the said judgment in default against the judgment debtors on the ground that it was irregular as the interest ordered to be paid in the judgment far exceeded that allowed under O. 42 r. 12 of the Rules of the High Court 1980.

In order to have the judgment in default set aside, the respondent applied to the Court for leave to be made a party to the said suit and was allowed to intervene and be made a party in the action by the Senior Assistant Registrar of the High Court on 13 September 1989. The appellant appealed to the Judge in chambers on 16 September 1989, and its appeal was dismissed by the learned Judge on 20 February 1990.

On appeal before us, Mr. D.P. Naban, leading Counsel for the appellant, pointed out that the principal debtors have not applied to set aside the judgment in default which, at the relevant time, that is 18 February 1985, allowed interest to be at the contractual rate and not that as laid down in O. 42 r. 12. Counsel contended that the respondent should have applied to set aside the agreement in his said letter of undertaking on which the appellant had instituted an action against him in Kuala Lumpur Sessions Court Summons No. 62-3975-1988 for breach of the said undertaking. Mr. Naban then referred to the following test laid down by the Privy Council in *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52 & 56 for the Court to decide whether a person is entitled to be added as a party:

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

and contended that the learned Judge had applied the wrong test in this case.

It was held by the Privy Council in the *Pegang Mining Co. Ltd.* (*supra*) case that one of the principal objects of O. 16 r. 11 of the former Rules of the Supreme Court 1957, is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. It must be noted that the Privy Council in that case added that to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases. Our present O. 15 r. 6 of the Rules of the High Court 1980, which replaced the former O. 16 r. 11 of the Rules of the Supreme Court 1957, is in *pari materia* with O. 15 r. 6 of the UK Supreme Court Practice. The scope of the present rule, so far as concerns the joinder of persons not parties has been significantly extended by the addition of para. 2(b)(ii) which is as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (b) order any of the following persons to be added as a party, namely:
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the U.K. Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following *dictum* of Lord Denning MR, in that case, in which His Lordship said as follows:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the Court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the Court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome.

In our present case, we considered that the respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside. Both the learned Judge and the Senior Assistant Registrar were therefore right in exercising their discretion to allow the respondent to intervene in the said suit between the appellant and the judgment debtors, and the learned Judge had correctly dismissed the appellant's appeal to him. That was the reason why we confirmed the High Court's decision and also dismissed this appeal to us with costs.

Also found at [1991] 2 CLJ 862